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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ORACLE HIGHLANDS, LLC, an Arizona limited liability company, Plaintiff/Appellee, v. FIDELITY NATIONAL TITLE AGENCY, INC., an Arizona corporation, Trustee under Trust No. 10,869, Defendant/Appellant.	2 CA-CV 2010-0176 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200901544

Honorable Gilberto V. Figueroa, Judge

AFFIRMED

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By Jeffrey Willis, Andrew M. Jacobs and Sarah K. Jezairian — Tucson
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B R A M M E R, Presiding Judge.

¶1 Appellant Fidelity National Title Agency, Inc. (Fidelity) appeals from the trial court's grant of summary judgment in favor of appellee Oracle Highlands, L.L.C. (Oracle). Fidelity argues the court was precluded from entering summary judgment against it because extrinsic evidence established a genuine issue of material fact about the parties' intentions regarding the release provision in the deed of trust to which they are parties. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to the party against whom summary judgment was entered, drawing all justifiable inferences in its favor. *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). Fidelity entered into an agreement to sell a parcel of undeveloped real property to Diamond Ventures, Inc., which subsequently assigned its interest in the agreement to Oracle. The terms of the agreement provided for a carry-back loan (loan) evidenced by a promissory note secured by a deed of trust (DOT). The DOT was an agreement between Oracle as trustor, Fidelity as beneficiary, and Lawyers Title Agency of Arizona, L.L.C. (Lawyers Title) as trustee. Lawyers Title held legal title to the property pending Oracle's payment of the loan. The DOT provided that title to portions of the real property would be released from the lien of the DOT and conveyed to Oracle as it made payments to reduce the principal balance of the loan. Oracle was to make semi-annual payments of principal and interest and a "balloon" payment on the note's maturity date of all remaining amounts due on the loan.

¶3 Oracle made payments totaling over $1 million between March 2006 and July 2008, of which $255,977.25 was applied to the loan's principal. It did not make the approximately $3,000,000 balloon payment due on November 15, 2008, the loan's maturity date.

¶4 On December 10, 2008, Oracle sent a letter to Fidelity noting the amount of principal it had paid, referring to the DOT's release provision calling for conveyances to Oracle of one acre for each $7,500 of principal paid, and attaching a deed describing 34.13 acres of property (deed) to be released. In March 2009, Fidelity demanded that Oracle pay all amounts due on the loan. Fidelity refused to execute the deed, contending Oracle was not entitled to be conveyed the property because it had defaulted on the November balloon payment.

¶5 Oracle filed an action against Fidelity and others not parties to this appeal to quiet title to the 34.13 acres, and Fidelity counterclaimed for reformation of the DOT. The trial court granted summary judgment in favor of Oracle, quieting title in it to the 34.13 acres, and also awarding it attorney fees and costs. This appeal followed.

Discussion

¶6 Fidelity contends the trial court erred in granting Oracle summary judgment because the court limited "its analysis to the four corners of the Deed of Trust" and because "substantial evidence" supported Fidelity's reformation claim. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). And a court should grant a motion for summary judgment "if the facts produced in

support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). "On appeal from a summary judgment, we must determine de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998).

¶7 Fidelity argues extrinsic evidence reveals a genuine issue of material fact as to the parties' intentions regarding the language for the release provision in exhibit C to the DOT. That provision states:

> Beneficiary will request releases with each semi-annual payment under the Note, which payments may include additional principal payments (based on $7,500.00 per acre), star[t]ing in the Northwest corner of the Trust Property and moving South and Southeast. The size of each release will be based upon the principal portion of each payment. Each release will be contiguous to a prior release.

Fidelity is defined on the DOT's first page as its beneficiary.

¶8 Fidelity attached to its opposition to Oracle's motion for summary judgment an email Oracle's counsel had sent to Fidelity's counsel, which contained suggested language for the DOT's release provision substantially similar to the language contained in the DOT, but instead providing that "Purchaser [Oracle] will request releases." Fidelity also attached a declaration of its counsel stating the language in that email had been accepted by the parties and asserting the language appearing in the DOT that "Beneficiary [Fidelity] will request releases" was the result of a drafting error.

Fidelity asserts the email and declaration constitute "extrinsic evidence of the parties' negotiations" demonstrating "the parties intended that the purchaser [Oracle] would request releases."

¶9 The parol evidence rule prohibits the admission of extrinsic evidence to vary or contradict the terms of a contract, although such evidence is admissible to interpret them. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). A court must consider the evidence, but need admit it only when the contract language is "reasonably susceptible" to the interpretation offered by the proponent, and then only to determine the parties' intended meaning. *Id.* at 154, 854 P.2d at 1140. "When 'the provisions of the contract are plain and unambiguous upon their face, they must be applied as written, and the court will not pervert or do violence to the language used, or expand it beyond its plain and ordinary meaning or add something to the contract which the parties have not put there.'" *Employers Mut. Cas. Co. v. DGG & CAR, Inc.*, 218 Ariz. 262, ¶ 24, 183 P.3d 513, 518 (2008), *quoting D.M.A.F.B. Fed. Credit Union v. Employers Mut. Liab. Ins. Co. of Wis.*, 96 Ariz. 399, 403, 396 P.2d 20, 23 (1964).

¶10 Parol evidence is admissible in a reformation action to prove the content of a pre-existing and express agreement between the parties, *McNeil v. Attaway*, 87 Ariz. 103, 110, 348 P.2d 301, 305 (1960), and to establish the intent of the parties. *Longshaw v. Corbitt*, 4 Ariz. App. 408, 411, 420 P.2d 980, 983 (1966). However, the trial court must first find clear and convincing evidence that "(1) a mutual mistake was made by the parties in drafting the instrument, and (2) that the minds of the parties had met on a

definite intention before the instrument was drafted." *Phil Bramsen Distrib., Inc. v. Mastroni*, 151 Ariz. 194, 198, 726 P.2d 610, 614 (App. 1986). Or, if the mistake is unilateral, the party opposing admission of the evidence must have engaged in fraud or other inequitable conduct.[1] *Jeffries v. First Fed. Sav. & Loan Ass'n of Phoenix*, 15 Ariz. App. 507, 510, 489 P.2d 1209, 1212 (1971). "'In the absence of clear and convincing evidence to support the [proponent]'s allegation of mistake, [a] court will not trifle with or cause to be reformed a duly executed and valid deed.'" *Long v. City of Glendale*, 208 Ariz. 319, ¶ 47, 93 P.3d 519, 532 (App. 2004), *quoting Corn v. Branche*, 74 Ariz. 356, 358, 249 P.2d 537, 538 (1952).

¶11 Neither the email nor the declaration are admissible under the parol evidence rule because Fidelity offers them to vary or contradict the plain meaning of the DOT's provisions, not to interpret one of its terms. *See Taylor*, 175 Ariz. at 152, 854 P.2d at 1138. The proffered evidence would merely supplant the term "[b]eneficiary" with the term "purchaser." Moreover, no interpretation is required because the term "[b]eneficiary" is defined clearly on the DOT's first page.

¶12 Nor is the evidence admissible merely because Fidelity asserted a counterclaim for reformation, as the items do not constitute clear and convincing evidence of either a mutual mistake or a prior agreement. *See Mastroni*, 151 Ariz. at 198, 726 P.2d at 614. Although the email suggested possible language for inclusion in the DOT, it does not demonstrate that both parties had agreed to those terms, *see id.*, and

[1]Fidelity has not argued the alleged drafting error resulted from any fraudulent conduct on Oracle's part.

nothing in the record suggests otherwise.[2] In his declaration, Fidelity's counsel asserts the language proposed in the email "was accepted" and "was to be incorporated," and concludes the final language in the DOT resulted from a drafting error. But a self-serving affidavit failing to set forth specific facts demonstrating the existence of a genuine dispute, instead merely providing conclusory allegations, cannot defeat a motion for summary judgment. *See Florez v. Sargeant*, 185 Ariz. 521, 526-27, 917 P.2d 250, 255-56 (1996) ("[A]ffidavits that only set forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment.").

¶13 The evidence Fidelity proffered is inadequate to persuade a reasonable person that it is "highly probable" there was a pre-existing and definite agreement between Oracle and Fidelity as to the release provision and that the language of the DOT was the result of a mutual mistake.[3] *See State v. Renforth*, 155 Ariz. 385, 387, 746 P.2d 1315, 1317 (App. 1987) (clear and convincing evidence persuades fact finder truth of

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[2]The dissent suggests Oracle should have responded to Fidelity's submission of the email and affidavit. But any response would have been redundant to the DOT's clear indication that the parties had agreed to something other than the language in the email.

[3]In prior cases where courts found clear and convincing evidence to support reformation of a contract there first was found a clear indication of a mistake in the final agreement independent of evidence of a pre-existing intended agreement, in contrast to here, where Fidelity seeks to use the purported prior agreement as evidence the language in the DOT resulted from a mistake. *See*, *e.g.*, *Mastroni*, 151 Ariz. at 197, 198, 726 P.2d at 613, 614 (formula for escalation clause in lease used index parties later found did not exist and court then looked to what parties intended to be basis for clause); *Jeffries*, 15 Ariz. App. at 510, 489 P.2d at 1212 (trial court did not err in reforming savings certificate to face value of $10,100 instead of $15,000 because could find mutual mistake where only $10,000 paid for certificate); *Longshaw*, 4 Ariz. App. at 410, 412, 420 P.2d at 982, 984 (after survey revealed true owner of portion of lot occupied by another party court could look to parties' intended boundary line when conveyed).

assertion highly probable); *see also Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008 (summary judgment appropriate if "reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense"). The DOT's release provision plainly states Fidelity as its beneficiary was the party required to request releases. *See Corn*, 74 Ariz. at 358, 249 P.2d at 538 ("[I]n the absence of clear and convincing evidence, sufficient to reform [a] deed, . . . the intention of the parties is arrived at by the language contained within the instrument.").

¶14 Fidelity also contends the DOT's release provision was illogical as written, and thereby provides further evidence the parties intended Oracle as the party to request releases. Specifically, Fidelity argues the DOT contains another provision—paragraph twelve—granting it the power to release the property and reasons that an additional provision requiring it to request releases would be unnecessary as superfluous. It further argues the specific parcels to be released could be identified only by Oracle and only associated "with each semi-annual payment," because it would be nonsensical for Fidelity to request releases from itself.

¶15 The DOT's release provision is consistent with the DOT's paragraph twelve—not merely duplicative—and thus signals neither a mistake nor a drafting error. Paragraph twelve requires Fidelity to request Lawyer's Title to convey title to the trust property to Oracle when it pays the loan in full. It also permits Lawyer's Title to deed to Oracle part of the trust property, "with the consent of [Fidelity]," stating that Fidelity cannot "unreasonably withhold or delay [its] consent." Paragraph twelve consistently provides for full or partial releases of the trust property by Lawyer's Title with the

consent of or at the request of Fidelity. The release provision at issue provides additional details, expanding on the basic provisions for release contained in paragraph twelve. It provides the time for Fidelity to request each release and the method for selecting the parcels to be released. This provision provides the details necessary to facilitate the required releases.

¶16 Neither does the DOT require Fidelity to request releases from itself as it contends. Instead, Fidelity must request releases from Lawyer's Title, the party holding legal title to the trust property. And we cannot agree that Oracle must be the party to request releases because only it can identify which parcels are to be released. The release provision sets forth the method for determining which parcels to release and is not so ambiguous that we are required to conclude that the party requesting releases must specify certain parcels and that only Oracle could do so. And, Fidelity's interpretation of the DOT's release provision that Oracle "request releases with each semi-annual payment" is puzzling. That provision only relates to the timing of release requests and in no way mandates that the party requesting releases be the same as the party making the principal payment. The provision's plain language clearly and reasonably requires Fidelity to request releases at the time semi-annual payments are made. Therefore, we cannot agree with Fidelity's argument that the DOT cannot make sense as written.

¶17 Fidelity also contends the trial court erred in determining Oracle's right to partial releases from the DOT was a protected entitlement. Fidelity argues the clear language of the DOT suspends Oracle's right to partial releases when either it has been given a notice of default or "by any fact, circumstance or event which, with the passage

of time, and giving of notice, would mature into an event of default" on Oracle's part. Fidelity asserts Oracle was not entitled to any releases once it failed to make the balloon payment because that failure was an event of default. This argument, however, is inconsistent with the DOT's plain language as well as our determination that Fidelity was the party required by the DOT to request releases. And Fidelity was required to request releases upon the principal payments Oracle made before it failed to make the balloon payment. Oracle was entitled to partial releases so long as, at the time it made its principal payments, it was not in default and no event had occurred which could give rise to its default with either the passage of time or giving of notice. The default provision does not require Oracle to forfeit releases to which it previously was entitled, but which had been withheld from it wrongfully, just because a subsequent event has occurred that could give rise to a default on its part. *See Eisele v. Kowal*, 11 Ariz. App. 468, 471, 465 P.2d 605, 608 (1970) (forfeiture strongly disfavored).

¶18 Under the DOT's plain language, Fidelity was required to request releases of trust property to Oracle when principal payments were made and, contrary to our dissenting colleague's view, the record contains no clear and convincing extrinsic evidence suggesting otherwise. Consequently there was no genuine issue of material fact about the meaning of the DOT's release provision and the trial court properly awarded Oracle summary judgment. The court also correctly awarded judgment quieting title to the acreage that should have been released upon Oracle's principal payments made before it failed to make the balloon payment. The DOT does not require Oracle's forfeiture of its previously accrued release entitlements.

Disposition

¶19 For the reasons stated, we affirm the trial court's grant of summary judgment in favor of Oracle. We grant Oracle's request for attorney fees on appeal pursuant to A.R.S. § 12-341.01(A), pending its compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

H O W A R D, Chief Judge dissenting.

¶20 I must respectfully dissent because Fidelity submitted sufficient evidence to raise an issue of fact concerning reformation of the contract. We must accept as true all competent evidence submitted by Fidelity and the reasonable inferences drawn from that evidence. *See State v. City of Kingman*, 217 Ariz. 485, ¶ 7, 176 P.3d 53, 55 (App. 2008).

¶21 Fidelity proffered the affidavit of its attorney. That affidavit establishes that the purchase agreement required the parties to agree on a release schedule before closing. When they did not, Oracle stated in an e-mail that deciding on the release schedule was too difficult and suggested language in the deed of trust allowing "Purchaser," i.e., Oracle, to request releases with payments of principle. The affidavit

further establishes, for purposes of summary judgment, that the proposed language "was accepted and was to be incorporated into the Deed of Trust." In fact, counsel for Fidelity included that language in the deed of trust, except the term "Beneficiary" was substituted for "Purchaser." The affidavit further states that using the term "Beneficiary" was a drafting error. Finally, the affidavit states that in thirty-six years of practice, the attorney has not seen a transaction in which the seller requests the releases.

¶22 In response to Fidelity's arguments, Oracle has submitted nothing. It does not dispute that the parties had arrived at a meeting of the minds that it would request the releases, as its own attorney had suggested in the e-mail. It does not identify any other negotiations on the topic or show any reason that the meeting of the minds would have changed from that shown in its own counsel's e-mail. Oracle simply states that Fidelity's assertion is "unsupported" and, therefore, "meritless."

¶23 Accepting Fidelity's proffered evidence and all reasonable inferences therefrom as true, a reasonable person could determine it has produced clear and convincing evidence of a scrivener's error. *See* Restatement (Second) of Contracts § 155 cmt. a (1981) ("[T]here must have been some agreement between the parties prior to the writing. The prior agreement need not, however, be complete and certain enough to be a contract."); *see also Caliber One Indem. Co. v. Wade Cook Fin. Corp.*, 491 F.3d 1079, 1082-83 (9th Cir. 2007) (reformation warranted where no contemporaneous evidence produced to refute inference of mutual mistake); *cf. Hill-Shafer P'ship v. Chilson Family Trust*, 165 Ariz. 469, 472, 473, 799 P.2d 810, 813, 814 (1990) (because evidence viewed in light most favorable to party opposing summary judgment, court accepted that party's

statement of intent). Therefore, Oracle is not entitled to summary judgment. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990) (summary judgment should be granted only if "reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense"); *see also Parrish v. City of Carbondale*, 378 N.E.2d 243, 247 (Ill. App. Ct. 1978) ("Whether the evidence offered to support plaintiffs' claim of mutual mistake is sufficient to overcome the presumption that the written instrument expressed the true intent of the parties is primarily a question that the trier of fact must determine.").

¶24 Oracle notes that the affidavit does not show when the proposed change was accepted or by whom and does not specifically state that the acceptance was communicated. But the logical inference from the e-mail is that Fidelity's attorney accepted the changes and included them in the Deed of Trust. He included the proposed language in the Deed of Trust, except for the scrivener's error, thereby communicating to Oracle that Fidelity had agreed to forego the release schedule originally required by the purchase agreement. *See* Restatement § 155 cmt. a (meeting of minds need not be "complete and certain enough to be a contract"). And he, thereby, accepted Oracle's suggestion to allow Oracle to obtain the release property to be designated after each payment to accommodate the development schedule. Any additional details can be developed at trial. Oracle's position is really an attack on the credibility of the affidavit, but credibility determinations are inappropriate for summary judgment proceedings. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶25 Additionally, Fidelity notes the Deed of Trust states:

> Notwithstanding anything to the contrary contained herein, Trustor [Oracle] shall be entitled while there shall exist no Event of Default hereunder . . . to obtain partial releases of the Trust Property from the lien of this Deed of Trust upon payment to Beneficiary of principal owing under the Note in accordance with the Release Schedule and Map attached hereto as Exhibit C . . . .

And Oracle did not request any release until after it was in default. Although Oracle argued the provision allowing it "to obtain partial releases" pertains to additional releases to which it had not previously been entitled, the Deed of Trust does not say that. Because Oracle was already in default when it requested the partial releases, it is not entitled to any releases as a matter of law. *See Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009) (where terms clear, courts generally "'give effect to the contract as written'"), *quoting Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, ¶ 12, 138 P.3d 1210, 1213 (App. 2006).

¶26 I would reverse the decision of the trial court.

/S/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge